United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

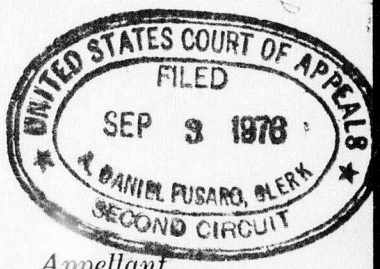
Original with affidavit of Mailing

76-6078

To be argued by
RICHARD P. CARO

United States Court of Appeals

FOR THE SECOND CIRCUIT



Docket No. 76-6078

LILLIAN GOLDBERG,

Appellant,

—against—

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND SUPPLEMENTARY APPENDIX FOR APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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RICHARD P. CARO,
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6078

LILLIAN GOLDBERG,

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—against—

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Appellee.

BRIEF AND SUPPLEMENTARY APPENDIX FOR APPELLEE

Preliminary Statement

This is an appeal from a final judgment and order of the United States District Court for the Eastern District of New York (Platt, *J.*), in favor of the Secretary of the Department of Health, Education and Welfare, entered on April 1, 1976, dismissing the complaint. The judgment sustained the Secretary's determination that the appellant is not entitled to widow's insurance benefits as a result of her remarriage prior to her attainment of the age of sixty (60).

Appellant contends that the District Court erred in affirming the Secretary's decision, on the grounds that (a) the Secretary was equitably estopped from denying the benefits because appellant had relied on a repre-

sentation by an employee of the Social Security Administration that she would not cease to be eligible for widow's insurance benefits if she remarried, and (b) the statute unconstitutionally discriminates on the grounds of marital relationship and age against widows who remarry prior to their sixtieth birthday. Appellee takes the position that the District Court properly determined that the doctrine of estoppel is inapplicable in the instant case, and that Congress could constitutionally employ marital status and age criteria in establishing eligibility requirements for widow's insurance benefits.

Statement of the Case

This action arises from the denial of widow's insurance benefits under 42 U.S.C. § 402(e) to appellant, Lillian Goldberg, as a result of her marriage on May 21, 1972, approximately two months prior to her attainment of the age of sixty (60) years on July 15, 1972.

Generally, the widow of a wage earner is entitled to receive widow's insurance benefits upon attaining the age of sixty (60). 42 U.S.C. § 402(e)(1)(B)(i). If she subsequently remarries, benefits are reduced but not terminated. 42 U.S.C. § 402(e)(4). In 1968 Congress amended the law to extend benefits to widows with a disability who are at least fifty (50) years old. 42 U.S.C. § 402(e)(1)(B)(ii). No provision was made, however, for the continued payment of any benefits to such a disabled widow who remarries prior to her sixtieth birthday.

In the case at bar, Lillian Goldberg began receiving widow's benefits at the age fifty-three (53) because she had a qualifying disability (A. 10).[1] On May 21, 1972,

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[1] Numerals in parentheses refer to pages in the Appellant's Appendix, unless otherwise specified.

while she was still fifty-nine (59) years of age, she remarried (A. 60) and subsequently was found ineligible to receive any benefits under 42 U.S.C. § 402(e)(B)(i) (A. 11). Her marriage took place approximately two months prior to her sixtieth birthday on July 15, 1972 (A. 10).

Appellant was sent a notice of termination on July 14, 1972 (A. 50). The Social Security Administration in its Reconsideration Determination, dated November 7, 1972, affirmed the decision that appellant was not entitled to benefits after May, 1972 (A. 51-52).[2] Following a hearing held on May 8, 1973, an Administrative Law Judge concluded that, by remarrying before attaining her sixtieth birthday, appellant lost her right under the statute to receive widow's insurance benefits based on the earnings record of her deceased first husband (Hearing Decision, July 10, 1973, A. 7-11). The Appeals Council's affirmance of the Administrative Law Judge's determination became the final decision of the Secretary (A. 3). Upon review in the United States District Court for the Eastern District of New York, the Hon. Thomas C. Platt upheld the decision of the Secretary and granted the Government's motion for summary judgment on April 1, 1976.

It was undisputed below that prior to her remarriage, Lillian Goldberg telephoned her local Social Security office to inquire whether her then contemplated remarriage would result in a loss of her widow's disability benefits.[3] She was either erroneously or inaccurately

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[2] The benefits erroneously paid for the months of June and July, 1972 were not required to be refunded (A. 11).

[3] Opinion of the District Court, *infra*, for the Appellee p. 5, Supplementary Appendix ("SA").

advised that the benefits would only be reduced.[4] As a result of this telephone conversation, appellant contends that the Government should be estopped from finding her statuorily ineligible for benefits.

Alternatively, it is argued that the above statutory provisions should be declared unconstitutional because the statutory classifications of persons eligible to receive benefits arbitrarily discriminate on the grounds of marital status and age in violation of the equal protection and due process clauses.

POINT I

The doctrine of equitable estoppel may not be invoked in the instant case to confer a benefit that is statutorily precluded.

The District Court held that the doctrine of equitable estoppel could not be raised in this case to require the Government to pay appellant widow's insurance benefits to which she was not entitled under the statute (Opinion, *infra*, p. SA-10). In reaching its decision the District Court relied on precedent including *Terrell* v. *Finch*, 302 F. Supp. 1063 (D. Tex. 1969) and *Flamm* v. *Ribocoff*, 203 F. Supp. 507 (S.D.N.Y. 1961).[5]

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[4] The testimony at the hearing concerning the telephone conversation did not establish that appellant had advised the Social Security employee of her age (A. 27-28, 32-33). Therefore, this crucial fact was apparently not disclosed by appellant in her inquiry. Also, no evidence was adduced that appellant attempted by any other means to obtain additional information concerning her entitlement to benefits.

[5] Both cases involved denial of claims following appellant's alleged reliance on misinformation supplied by Social Security Administration personnel.

The District Court, citing *Terrell*, *supra*, 302 F. Supp. at 1064, noted that social security benefits are created by statute, not common law and the claimant must comply with the statutory provisions in order to assert an enforceable right (*infra*, p. SA-9). And citing *Flamm*, *supra*, 203 F. Supp. at 510, Judge Platt emphasized that estoppel may not be invoked against the Government based on an allegation of reliance upon erroneous information, since parties are charged with knowledge of applicable statutes and bound by their provisions (*Id.*). The District Court also distinguished *Corniel-Rodriguez* v. *Immigration and Naturalization Service*, 532 F.2d 301 (2d Cir. 1976), on the ground that the Government in that case, unlike the present claim, had an affirmative duty to provide the plaintiff with accurate information even in the absence of a request by the affected party for such information (*infra*, p. SA-10).

There are three basic reasons in addition to those given by the District Court, why this Court should uphold the determination that the Social Security Administration may not be required to pay widow's insurance benefits to appellant as a result of the doctrine of estoppel. First, Lillian Goldberg is not statutorily eligible for the benefits; to require the benefits to be paid would be tantamount to overriding the legislative authority of Congress:

> We recognize the force of the proposition that estoppel should be applied against the Government with utmost caution and restraint, for it is not a happy occasion when the Government's hands, performing duties in behalf of the public, are tied by the acts and conduct of particular officials in their relations with particular individuals. * * *
>
> Indeed the tendency against Government's estoppel is particularly strong where the official's con-

> duct involves questions of essentially legislative significance, as where he conveys a false impression of the laws of the country. Obviously, Congress's legislative authority should not be readily subordinated to the action of a wayward or unknowledgeable administrative official. *Schuster* v. *C.I.R.*, 312 F.2d 311, 317 (9th Cir. 1962).

Second, the doctrine of estoppel should not be employed to require the conferral of benefits not statutorily available since estoppel, like laches, constitutes only an equitable defense.[5a] "While estoppel may be urged for the protection of a right, it can never create a right." *Royal Indemnity Co.* v. *Clingan*, 364 F.2d 154, 158 (6th Cir. 1966). In the instant case, appellant urges this Court to vest in her a substantive right in contravention of the provisions of the applicable statute.

Finally, a person who relies on erroneous information is entitled to raise the defense of equitable estoppel only where he or she establishes not only a lack of knowledge but also the absence of means to ascertain the necessary facts in question. The rule was stated aptly in *Flagstaff Liquor Co.* v. *United States*, 388 F. Supp. 554, 570 (U.S. Customs Ct. 1974):

> Fundamentally, in the law of estoppel, one claiming to have been misled through lack of knowledge of certain facts must have been without convenient or ready means of acquiring such knowledge, and must have exercised reasonable diligence to acquire knowledge of the true facts.

[5a] In *Corniel-Rodriguez* v. *INS*, *supra*, and *United States* v. *Lazy FC Ranch*, 481 F.2d 985 (9th Cir. 1973), the doctrine of equitable estoppel was raised as a defense to the Government's attempt to deport the alien in the former case, and to the Government's attempt to recover excess payments in the latter case.

See also, *United States* v. *Aetna Casualty & Surety Co.*, 480 F.2d 1095, 1099 (8th Cir. 1973). This prerequisite is not satisfied here because the statute was publicly available. Furthermore, the Court should take judicial notice of the fact that at the relevant times herein Social Security Administration publications explaining benefits and pertinent eligibility requirements were available to the public. Under these circumstances, it can not be concluded that reliance merely upon a telephone inquiry, which is easily subject to error and misunderstanding, satisfied appellant's obligation to use reasonable means to learn what were the statutory prerequisites for continued eligibility for widow's insurance benefits.

For these reasons, the Court should hold that the District Court properly concluded that Lillian Goldberg may not invoke the doctrine of estoppel to require widow's benefits to be paid to her notwithstanding her marriage.

POINT II

The statutory classifications of persons eligible for widow's insurance benefits are not unconstitutional under the equal protection or due process clauses.

In 1965 Congress amended the termination of benefits provisions respecting widow's insurance benefits to provide for a reduction rather than the total elimination of benefits to qualified widows who subsequently remarried. Act of July 30, 1965, P.L. 89-97, 79 Stat. 403-04. Subsequently in 1968 Congress extended widow's insurance benefits to unremarried widows who were disabled and were at least fifty (50) but not yet sixty (60) years of age. Act of Jan. 2, 1968, P.L. 90-248, 81 Stat. 828-33.

It is contended that the above statutory scheme is unconstitutional in so far as a widow who remarries prior to attaining the age of sixty (60) is denied all benefits even after she has reached sixty (60) years of age as long as she remains married.[6] Appellant contends that this difference in treatment is unconstitutional because it discriminates on the basis of marital status and age without sufficient justification.

It is contended by appellant that in so far as eligibility for benefits is dependent upon marital status, the classifications are an unconstitutional infringement on the fundamental right to marry, the right to privacy and freedom of association. In so contending, appellant disregards the fact that her claim to these benefits derives from her marital relationship with the wage earner who was her husband. That eligibility for benefits may be dependent upon marital or familial relationships without violating the Constitution can not be gainsaid. See generally, *Weinberger* v. *Salfi*, 422 U.S. 749, 777-85 (1975). See also *Kahn* v. *Shevin*, 416 U.S. 351, 353-56 (1974). Consequently, the fact that statutory eligibility is based upon marital status does not for that reason alone render the law unconstitutional.

The crux of the constitutional objection then is the contention that the statute unconstitutionally discriminates on the basis of age by requiring a widow to remain

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[6] Appellant also contends that in so far as the statute discriminates against a disabled widow by failing to allow her to retain benefits if she remarries, the statute is unconstitutional. As the District Court found below, appellant lacks standing to raise this issue because she received all such benefits which are only available until the disabled widow reaches the age of sixty. Appellant therefore lacks the requisite personal injury to litigate this issue. *See generally, Evans* v. *Town of New Castle*, — F.2d — (2d Cir., Docket No. 74-1793, June 4, 1976) (en banc).

unmarried until her sixtieth birthday. The complained of discrimination results from granting benefits to widows who remarry after they attain the age of sixty (60) and denying benefits to those who remarry earlier, regardless of the latters' need.

The Constitution, however, does not require Congress or a State "to create a more comprehensive social insurance program than it already has." *Geduldig* v. *Aiello*, 417 U.S. 484, 495-96 (1974). See also, *Danbridge* v. *Williams*, 395 U.S. 471, 486-87 (1970). Furthermore, it is clear that distinctions based upon age are not constitutionally impermissible. *McIlvaine* v. *Pennsylvania*, 415 U.S. 986 (1974); *Rubino* v. *Ghezzi*, 512 F.2d 431 (2d Cir.), *cert. denied*, — U.S. —, 96 S. Ct. 187 (1975). *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd*, 420 U.S. 940 (1975). Unless it is concluded that Congress could not rationally impose any age requirement upon eligibility for widow's benefits, or that Congress could not distinguish between a thirty (30) or sixty (60) year old widow, then Congress' judgment to limit eligibility to widows who attain sixty (60) years of age must remain undisturbed.[7]

Admittedly such an "objective" eligibility requirement may result in a denial of benefits to some in need but practical considerations of administration and management of the trust fund allow eligibility for benefits to be predicated on objective criteria rather than on a case by case basis. See, *e.g.*, *Matthews* v. *Lucas*, — U.S. —, 96 S. Ct. 2755, 2764-67 (1976); *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 781-85 (1975). As the Court stated in *Dandridge* v. *Williams*, *supra*, 397 U.S. at 485:

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[7] Congress was cognizant of the impact of loss of benefits in widows and widowers who remarried after attaining the age of sixty. See S. Rep. No. 404, 89th Cong. 1st Sess. (1965).

> If the classification has some "unreasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 200 U.S. 61, 78. "The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be and unscientific." *Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70.

What appellant would require is that widow's insurance benefits be available to widows and former widows upon attainment of the age of sixty (60), regardless of the date of remarriage, upon a case by case determination of need. The Constitution, however, does not require that benefits be afforded only upon a basis of individual determinations. On the contrary, the Supreme Court in *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 781-85, noted its approval of the use of such "duration-of-relationship" eligibility requirements:

> Large numbers of people are eligible for these programs and are potentially subject to inquiry as to the validity of their relationships to wage earners. These people include not only the classes which appellees represent, [footnote omitted] but also claimants in other programs for which the Social Security Act imposes duration-of-relationship requirements.* Not only does the prophy-

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* Footnote 14 in the Court's opinion reads:

See 42 U.S.C. §§ 416(b), (f), (g), defining "wife," "husband," and "widower." These various definitions impose duration-of-relationship requirements with regard to "wife's" benefits, 42 U.S.C. § 402(b) (1970 ed. and Supp. III), "husband's" benefits, 42 U.S.C. § 402(c), and "widower's" benefits, 42 U.S.C. § 402(f) (1970 ed. and Supp. III). In addition, "widow's" benefits, 42

[Footnote continued on following page]

lactic approach thus obviate the necessity for large numbers of individualized determinations, but it also protects large numbers of claimants who satisfy the rule from the uncertainties and delays of administrative inquiry into the circumstances of their marriages.***

The administrative difficulties of individual eligibility determinations are without doubt matters which Congress may consider when determining whether to rely on rules which sweep more broadly than the evils with which they seek to deal. In this sense, the duration-of-relationship requirement represents not merely a substantive policy determination that benefits should be awarded only on the basis of genuine marital relationships, but also a substantive policy determination that limited resources would not be well spent in making individual determinations. ***

There is thus no basis for our requiring individualized determinations when Congress can rationally conclude not only that generalized rules are appropriate to its purposes and concerns, but also that the difficulties of individual determinations outweigh the marginal increments in the precise effectuation of congressional concern which they might be expected to produce.

U.S.C. § 402(e) (1970 ed. and Supp. III), are available only to those women who satisfy § 416(c)'s definition of "widow." "Parent's" benefits, 42 U.S.C. § 402(h), are also subject to an objective eligibility requirement which is similar to a duration-of-relationship requirement. Under 42 U.S.C. § 402(h)(3), stepparents and adoptive parents may receive benefits with respect to a deceased child who was providing at least half of their support, but only if the marriage or adoption creating their relationship occurred prior to the child's 16th birthday.

Under these circumstances it can not be concluded that by imposing an "age" requirement that Congress "invidiously discriminated" against former widows who became sixty (60) or more years old but who remarried before reaching the age of sixty, (*e.g.*, a widow who had remarried at thirty years of age) in failing to make them eligible for any benefits under the widows' insurance benefit's provisions:

> [A] noncontractual claim to receive funds from the public treasury enjoys no constitutionally protected status, . . . though of course Congress may not invidiously discriminate among such claimants . . . on the basis of criteria which bear no rational relation to a legitimate legislative goal. (Citations deleted). *Weinberger* v. *Salfi*, *supra*, 422 U.S. at 772.

Marital status and age criteria bear a rational relationship to the valid Congressional purpose of maximizing the effectiveness of the Social Security benefits program.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted,

DAVID G. TRAGER,
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JOSEPHINE Y. KING,
RICHARD P. CARO,
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Of Counsel.

SUPPLEMENTARY APPENDIX

Docket Entries

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 157

LILLIAN GOLDBERG,

Plaintiff,

—against—

CASPAR WEINBERGER, Secretary of Health, Education & Welfare, BERNICE L. BERNSTEIN, Regional Director, Health, Education & Welfare and THE DEPARTMENT OF HEALTH, EDUCATION & WELFARE,

Defendants.

BASIS OF ACTION: Review examiner's decision
Seeks: Reversal of decision

Date	*Plaintiff's Account*	*Received*	*Disbursed*
1-30-74	Complaint	15.00	
1-31-74	Paid to Treas.		15.—
4-30-76	Notice of Appeal	5.—	
5- 3-76	Paid to Treas.		5.—

Date	*Filings—Proceedings*	*Amount Reported in Emolument Returns*
1-30-74	Complaint filed. Summons issued.	1 JS5
3-20-74	Summons returned and filed executed.	2
4-10-74	Letter from Douglas J. Kramer dtd 4-3-74 filed.	3

Docket Entries

Date	*Filings—Proceedings*	*Amount Reported in Emolument Returns*
4-10-74	—By DOOLING, J—Order dtd 4-8-74 extending time to answer the complaint to 5-31-74 filed on document #3.	—
6- 4-74	—Letter from Douglas J. Kramer dtd 5-31-74 filed.	4
6- 4-74	—ANSWER and copy of proceedings at H.E.W. filed.	5
8-20-74	—Notice of motion and memorandum of law for summary judgment in favor of deft ret 9-14-74 at 10 A.M. filed.	6/7
10-11-74	—Before PLATT, J.—Case called and adjourned to 11-8-74 at 2:00 P.M.	
11- 8-74	—Before PLATT, J.—Case called—Adjd to 11-22-74 at 2:00 P.M.	
11-22-74	—Before PLATT, J.—Case called and adjourned to 12-13-74.	
12-13-74	—Before PLATT, J.—Case called—Adjd to 12-20-74	
12-20-74	—Before PLATT, J.—Case called—Adjd to 1-24-75	
1-27-75	—By PLATT, J.—Order dated 1-27-75 filed that the pltff may file the attached amended complaint, etc.	8
1-27-75	—Amended Complaint filed.	9
3-27-75	—Amended answer filed.	10

Docket Entries

Date	*Filings—Proceedings*	*Amount Reported in Emolument Returns*
4-29-75	—By PLATT, J.—Stipulation dtd 4-10-75 extending time for deft to answer to 5-12-75 filed.	11
10-10-75	—Before PLATT, J.—Case called —Adjd to 12-5-75 for all motions.	
11-19-75	—Notice of Motion, ret. 12-5-75 filed re: for summary judgment, etc.	12
11-19-75	—Pltff's Brief filed.	13
1- 7-76	—Deft's brief filed.	14
1-16-76	—Before PLATT, J.—Case called & adj'd to 1-23-76.	
1-22-76	—Pltff's reply memorandum filed.	
2-23-76	—Before PLATT, J.—Case called—Motion to dismiss—Argued—Decision reserved.	
4- 2-76	—By PLATT, J.—Opinion & Order dtd 4-1-76 granting deft's motion for summary judgment filed. Copies mailed.	15
4- 5-76	—JUDGMENT dtd 4-2-76 dismissing the complaint filed.	16
4-30-76	—Notice of appeal filed. Duplicate mailed to C of A. jn	17
5-11-76	—Check for $250.00 deposited in the registry of the Court in lieu of bond on appeal.	—
5-17-76	—Civil appeal scheduling order filed.	18
5-26-76	—Above record certified and hand delivered to C of A.	—
5-27-76	—Receipt for record on appeal received from the C of A.	19

Opinion of the District Court

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 157

LILLIAN GOLDBERG,

Plaintiff,

—against—

CASPAR WEINBERGER, Secretary of Health, Education and Welfare,

Defendant.

April 1, 1976

PLATT, *D.J.*

PRELIMINARY STATEMENT

Plaintiff sues for Social Security widow's insurance benefits and both parties have moved for summary judgment, the defendant seeking dismissal of plaintiff's complaint, and plaintiff seeking benefits in whole or in part, or, in the alternative, injunctive relief and a declaration that 42 U.S.C. § 402(e)(1)(A) and (B) and § 402(e)(4) are unconstitutional on the grounds that they arbitrarily discriminate on the basis of marital status and/or age.

The dispute arises because the plaintiff, when she was a 59 year old widow receiving widow's disability insurance benefits, married her present husband about two months before she became 60 years of age. As a result of her remarriage before age 60, plaintiff became ineligible to receive (i) any more widow's disability insurance benefits, and (ii) any widow's insurance benefits

under the Social Security Act. In fact, although she was not eligible therefor since she had remarried some two months prior to age 60, plaintiff did receive all of her widow's disability insurance payments up to the date when she attained that age, *cf.* 42 U.S.C. § 402(e)(1).

The facts are not in dispute. Plaintiff was born on July 15, 1912 and attained the age of 60 years on July 15, 1972.

Plaintiffff was once married to a Mr. Murray Kaufman, who died. Thereafter plaintiff filed an application for widow's disability insurance benefits and received them beginning in 1969.

Shortly before her remarriage, plaintiff, at the urging of her son, talked on the telephone with a representative in the local Social Security Office about the possible effects of her forthcoming marriage upon her disability benefits. She was informed that the marriage might reduce her benefits but would not terminate them. The Administrative Law Judge, in the proceeding below, gave "full credence to her testimony that she did consult the local Social Security Office prior to her marriage and that she was misinformed as to the effect of her contemplated nuptial arrangements upon the benefits she was receiving."

Relying upon this information, plaintiff married her present husband, Mr. Goldberg, on May 21, 1972. In July 1972 plaintiff's Social Security benefits were terminated because she had remarried before attaining the age of 60.

As indicated, plaintiff's 60th birthday was on July 15, 1972, 55 days after she remarried.

Opinion of the District Court

The Administrative Law Judge made the following findings and conclusions:

> "1. The plaintiff filed an application for widow's insurance benefits on March 10, 1969, alleging disability from February, 1969 at age 53.
>
> "2. The claimant remarried in May, 1972, and attained age 60 on July 15, 1972.
>
> "3. By remarrying prior to the attainment of age 60, the claimant lost her right to obtain widow's benefits on the earnings record of her deceased husband, Murray Kaufman.
>
> "4. There was an overpayment created in the sum of $265.
>
> "5. The claimant was 'without fault' in the creation of such overpayment.
>
> "6. The recovery of such overpayment will be waived, since it is 'deemed' that such adjustment will be 'against equity and good conscience.' "

and it was the decision of the judge

> " * * * that, based on her application * * * the claimant is not entitled to widow's insurance benefits under Section 202 of the Social Security Act * * * ".

This decision was affirmed by the Appeals Council and plaintiff commenced the present action within 60 days from the date of such affirmance as required by 42 U.S.C. § 405(g).

THE ESTOPPEL ARGUMENT

Plaintiff first claims that the government should be estopped from terminating plaintiff's disability insurance benefits by reason of the misrepresentation of the local Social Security Office employee concerning the effects of plaintiff's proposed remarriage on such benefits and plaintiff's reliance thereon to her alleged detriment.

The law is and has for many years been, however, that "estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government". *Byrne Organization, Inc.* v. *United States*, 287 F.2d 582, 587 (Ct. Cl. 1961); *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380 (1947); *Massaglia* v. *C.I.R.*, 286 F.2d 258 (10th Cir. 1961); *Flamm* v. *Ribicoff*, 203 F. Supp. 507, 510 (S.D.N.Y. 1961); *Terrell* v. *Finch*, 302 F. Supp. 1063 (S.D. Tex. 1969); *Rock* v. *United States*, 279 F. Supp. 96, 101 (S.D.N.Y. 1968).

As the Government points out, the *Terrell* and *Flamm* cases, *supra*, are for all intents and purposes here indistinguishable. In both cases the claimant relied upon incorrect telephone information from an employee of the Social Security Administration, as did the plaintiff in the case at bar, and in both cases the Court denied plaintiff's motion for summary judgment. In *Terrell*, where claimant remarried in reliance on such misinformation only 26 days before her sixtieth birthday, the Court said (302 F. Supp. at p. 1064):

> "Thus, if a widow remarries before age sixty, she forfeits her right to widow's insurance benefits. It is clear that plaintiff has not complied with the

provisions of the Act. Unless the government is estopped to deny plaintiff the widow's insurance benefits, the decision of the hearing examiner must be affirmed.

> 'It is an established proposition that estoppel cannot be set up against the Government on the basis of an unauthorized representation or act of an officer or employee who is without authority in his individual capacity to bind the Government.' Byrne Organization Inc. v. United States, 287 F.2d 582, 587 (Ct. Cl. 1961). See also, Massaglia v. C.I.R., 286 F.2d 258 (10th Cir. 1961); Ewing v. Risher, 176 F.2d 641 (10th Cir. 1949); Southern Hardwood Traffic Assoc. v. United States, 283 F. Supp. 1013 (W.D. Tenn. 1968); Flamm v. Ribicoff, 203 F. Supp. 507 (S.D.N.Y. 1961); Taylor v. Flemming, 186 F. Supp. 280 (W.D. Ark. 1960).

"There is no doubt that the local employee of the Social Security Administration who purportedly misinformed plaintiff was not authorized to make the representation in question.

"Ewing v. Risher, *supra;* Flamm v. Ribicoff, *supra;* and Taylor v. Flemming, *supra*, are all cases in which local Social Security employees allegedly misinformed claimants. In each case the courts ruled that estoppel would not apply. In *Taylor*, a plaintiff seeking dependent parent's insurance benefits was erroneously informed that she did not have to file a proof of support. In ruling that estoppel did not apply the Court said:

> 'It is apparent that plaintiff is attempting to assert some type of estoppel against the defend-

ant; however, no cases are cited in support of this position. If Mrs. Taylor did rely to her detriment upon such a statement, it is indeed unfortunate. However, the Government cannot be estopped from insisting upon performance of statutory conditions precedent by the unauthorized acts of an employee of a local Social Security Office.' *Id.* at 284.

"The right to widow's insurance benefits that plaintiff seeks to enforce here is one created by statute, not by common law. Plaintiff must comply with the statutory requirements in order to have an enforceable right. The unauthorized act of a government employee cannot vary the requirements established by Congress."

and in *Flamm*, the Court held (203 F. Supp. at p. 510):

"But even assuming that he did receive "misinformation' on which Mrs. Berger acted to her detriment, it is plain that estoppel will not lie against the Government under these circumstances. Parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully promulgated regulations despite reliance to their pecuniary detriment upon incorrect information received from Government agents or employees. Failure to comply with the applicable statute and regulations precludes recovery against the Government 'no matter with what good reason' the claimant believed she had come within the requirements. Estoppel will not lie regardless of the financial hardship 'resulting from innocent ignorance.' Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380; Walker-Hill Co. v. United States, 162 F.2d 259 (7 Cir. 1947), cert. den.

> 332 U.S. 771; James v. United States, 185 F.2d 115 (4 Cir. 1950)."

Plaintiff herself cites and relies in part upon the *Massaglia* case, *supra*, but that case clearly does not support her position for there the late Chief Judge Murrah held (286 F.2d at p. 262:

> "* * * But neither the duty of consistency, nor the principles of equitable estoppel bind the Commissioner to unauthorized acts of his agents, Sanders v. Commissioner, 10 Cir., 225 F.2d 629, nor preclude him from correcting mistakes of law in the imposition and computation of tax liability, including the power to retroactively correct his rulings, regulations and decisions upon which taxpayers have relied. Automobile Club of Michigan v. Commissioner, 353 U.S. 180, 77 S.Ct. 707, 1 L.Ed.2d 746; * * *"

Corniel-Rodriguez v. *Immigration and Naturalization Service*, — F.2d — (2d Cir. March 22, 1976), slip op. 2713, does not change the principles that control here. While that case, which involved review of a deportation order, did hold that the government was estopped, the ruling was clearly limited to the facts before the Court. The major feature relied on by the Court of Appeals in *Corniel-Rodriguez* to distinguish cases like *Terrell* and *Flamm* seems to have been that the defendant was affirmatively required by regulation to present correct immigration information even in the absence of requests for information, see 22 C.F.R. § 42.122(d). Of course, no such regulation governs Social Security Office employees.

In short, as the law now stands plaintiff may not invoke the doctrine of estoppel to require that the government pay her widow's insurance benefits.

THE EQUAL PROTECTION ARGUMENT

The plaintiff further claims that Section 202(e)(1)(A) and (B) of the Sociay Security Act (42 U.S.C. § 402(e)(1)(A) and (B)) violates the Equal Protection Clause of the Constitution in that it discriminates between women similarly situated solely on the basis of marital status, granting disability benefits and widow's insurance benefits to widows who remain single but denying such benefits to widows who remarry before they reach 60. She also advances the closely related argument that such Section and Section 202(e)(4) of the Act violate the Equal Protection and Due Process Clauses of the Constitution in that they discriminate on the basis of age by granting widow's insurance benefits to women who marry after age 60 and denying such benefits to those who marry before attaining the age of 60.

Since plaintiff received and has been allowed to keep all of the widow's disability insurance benefits to which she would have been entitled even if she had not remarried, she lacks standing in this case to raise a constitutional objection to the statutory provision for termination of such benefits upon remarriage.

In other words, plaintiff received widow's disability insurance benefits from age 53 when she was first entitled to the same through July 15, 1972 when she attained age 60. Under 42 U.S.C. § 402(e)(1), if she had not remarried prior to the age of 60 her benefits would have been terminated since she would at that date have become "entitled to an old age insurance benefit equal to or exceeding the primary insurance amount of such deceased individual"—i.e., she would have been entitled to a widow's insurance benefit.

Plaintiff may also be understood to argue that a widow who has not remarried by age 60 can receive the standard widow's insurance benefits, that one who has remarried by age 60 cannot do so, and that this constitutes discrimination based on marital status. As will be discussed below, we cannot find that Congress had no rational basis for concluding that widows who remarry before 60 have less need for benefits than those who do not. And unless widows who remarry at *any* age, even in their 20's, are to be given benefits, Congress had to draw a line; we can only conclude that Congress had a rational basis for determining that such a line should be drawn somewhere, and cannot say that age 60 is an unreasonable place to draw it.

Thus plaintiff in the case at bar has no basis to make her claim that the statute discriminates between women similarly situated solely on the basis of marital status.

The second half of plaintiff's claim is, as indicated that the statute arbitrarily discriminates on the basis of age. The gist of this claim is that there is no rational basis to presume that marriage before age 60 improves a widow's economic situation and eliminates her need for social security benefits, but that marriage after 60 does not eliminate the need for social security benefits. This is; plaintiff says, particularly true in cases like hers where the claimant is disabled both before and after age 60.

Stated in another way, plaintiff says she was, on account of her disability, no more able to obtain or hold a job before 60 than she was after that age and Congress recognized that fact when they lowered the age of entitlement to widow's disability insurance benefits to 50. From this, plaintiff concludes that Congress *must have* overlooked inserting a provision in the law which would have

enabled disabled widows in their 50's who remarried to receive reduced benefits in the same manner as widows who remarried after 60.

Congress did not, however, overlook such contingency. It specifically provided that disabled widows who remarried in their 50's would stop receiving benefits on such remarriage. 42 U.S.C. § 402(e)(1).

Nor may it be said that no rational basis exists for making such distinction. Congress may well have concluded, for example, that a widow who remarries during her 50's (whether or not she is receiving disability benefits during her 50's) will in all likelihood marry a man who still has several years earning capacity from which she will derive support, and that the same is not likely to be true in the case of a widow 60 years or more.

CONCLUSION

In reality, in the case at bar, plaintiff when she remarried only 55 days short of her 60th birthday was in the same situation as all other widows just shy of their 60th birthday, and not in a special category on account of disability. By reason of an unfortunate mistake she remarried too soon and lost certain widow's benefits to which she might otherwise have been entitled. This Court, however, cannot rectify this situation; only Congress can.

Accordingly, defendant's motion for summary judgment must be granted and plaintiff's cross-motion must be denied in all respects.

So ORDERED.

THOMAS C. PLATT
U.S.D.J.

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STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 31st day of August 19 76 he served ~~a copy~~ two copies of the within

Brief and Supplementary Appendix for Appellee

by placing the same in a properly postpaid franked envelcpe addressed to:

David S. Preminger, Esq.
Legal Services for the Elderly Poor
~~2095 Broadway - Rm. 304~~
New York, N. Y. 10023

John C. Gray, Jr., Esq.
Brooklyn Legal Services Corp. B
152 Court St.
Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez

LYDIA FERNANDEZ

Sworn to before me this
31st day of August 19 76

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-1324[illegible]
Qualified in Queens County
Term Expires March 30, 1977